OPINION OF THE UNITED STATES

COURT OF APPEALS FOR THE

NINTH CIRCUIT

May 19, 1993

[994 F.2d 1370]

Debra J. GRUNWALD; Lewis N. Adams; Vicki S. Burdeaux; Maria Buselle, et al., Plaintiffs-Appellants,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT; Shelby Obershaw, President, SBCUSD; Hardy L. Brown, Vice President, SBCUSD; Elisa Diaz, School Board Member, et al.; San Bernardino Teachers Association, CTA/NEA, Defendants-Appellees.

Debra J. GRUNWALD; Lewis N. Adams; Vicki S. Burdeaux; Maria Buselle, et al., Plaintiffs-Appellees,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT; Shelby Obershaw, President, SBCUSD; Hardy L. Brown, Vice President, SBCUSD; Elisa Diaz, School Board Member, et al.; San Bernardino Teachers Association, CTA/NEA, Defendants-Appellants.

Nos. 88-6617, 88-6619

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 29, 1990.

Filed May 19, 1993.

Before: NELSON, BRUNETTI and KOZINSKI, Circuit Judges.

KOZINSKI, Circuit Judge:

In this dispute between an employee union and nonmember agency fee payers, we resolve the tension between the First Amendment's guarantee of free speech and the idiomatic truth that there's no such thing as a free lunch.

Facts

Plaintiffs are nonunion teachers employed by the San Bernardino Unified School District (the District). Even though they are not members of the San Bernardino Teachers Association (the SBTA or the union), plaintiffs must contribute to it. California law requires these payments because the SBTA and the District have an agency shop agreement under which the SBTA is the teachers' exclusive collective bargaining agent. *See* Cal. Gov't Code § 3502.5(a) (Deering 1982). As beneficiaries of collective bargaining, plaintiffs must help pay for it. To this end, $30 a month is deducted from their paychecks, which is the same as the amount paid by union members.

However, the union carries out some activities unrelated to collective bargaining, such as contributing to political candidates. Though part of the union members' $30 pays for these nonrepresentational activities, the agency fee payers[1] may not be required to support them. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-37 (1977). Therefore, agency fee payers may not be charged the same amount as union members; they must only be charged a lesser amount reflecting a pro rata portion of the union's expenditures on collective bargaining activities. In an

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[1] Nonunion teachers are called agency fee payers because they pay fees under the terms of the District's agency shop agreement. In contrast, the union teachers pay membership dues.

effort to satisfy this requirement, the District puts the amounts deducted from the paychecks of agency fee payers in an escrow account. Agency fee payers can get a refund of a portion of these amounts under a procedure set up by agreement between the District and the union. Plaintiffs challenge the constitutionality of this "deduction-escrow-refund" procedure.

The mechanics of the collection procedure are simple: One tenth of the annual union dues is deducted from every teacher's paycheck on the 30th of each month that school is in session—September through June. The union gets the deduction from the paychecks of the union members, but all of the agency fee payers' deductions are put into an independently managed interest-bearing escrow account. The fees stay in escrow until the refund procedure concludes.

The refund process is set in motion no later than October 15th. By that date, the SBTA sends notice to all nonmember contributors telling them how to obtain a rebate of funds not used for collective bargaining. Accompanying this notice is a calculation of the amount the SBTA deems chargeable to representational activities.

To obtain a refund, nonmembers must submit, no later than November 15, a letter objecting to the union's discretionary use of their fees. After they object, teachers may choose one of two routes to get their refund. They can accept the SBTA's calculation of the chargeable percentage, in which case the SBTA gives them a rebate for the entire year by December 7. Or they can dispute the union's allocation and request that the percentage be determined by arbitration. If they choose arbitration, an arbitrator chosen by the American Arbitration Association decides what portion of the total payment is chargeable to collective bargaining. The challenging fee payers and the SBTA may present evidence, orally or by affidavit, at a hearing to be held no later than December 15—a month after objections are made. The arbitrator must issue his award within 30 days of the close of the hearing, and the SBTA must pay the rebate within 20 days of the arbitrator's decision. Assuming a

hearing of roughly a week, the payment date falls sometime in mid-February.

Plaintiffs challenge these SBTA procedures under 42 U.S.C. § 1983. They claim the District may not, even temporarily, deduct from their paychecks more than what the union is entitled to receive for collective bargaining activities. Plaintiffs argue that even the temporary retention of funds not allocable to collective bargaining violates their First Amendment right against compelled speech.

Discussion

I

Plaintiffs base their argument on the now well-established principle that requiring nonmember employees to contribute to the union's ideological activities runs afoul of the First Amendment. The foundations of this idea are not new: Thomas Jefferson wrote that "to compel a man to furnish contributions of money for the propagation of [religious] opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31 (1977) (quoting I. Brant, James Madison: The Nationalist 354 (1948)). As *Abood* makes clear, this reasoning applies equally to compelled political contributions. 431 U.S. at 234-35. Thus, the First Amendment protects people from having to put their money where their mouth isn't.

Recent Supreme Court opinions reaffirm the First Amendment's ban on compelled subsidies of ideological causes. *See, e.g., Keller v. State Bar*, 496 U.S. 1, 15 (1989); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301-04 (1986). However, the Court has stated that union security agreements will not violate this prohibition, provided there are adequate protections for the First Amendment rights at stake. *Id.* at 301; *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 444 (1984).

Two basic principles emerge from the cases reviewing agency shop agreements: First, nonmembers have an absolute

right not to support speech they disagree with, so the union must not, under any circumstances, be able to use their money for ideological purposes. *Abood*, 431 U.S. at 235-36 (1977); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 238 (1956). Second, nonmembers have a further First Amendment right to a fair, prompt and effective procedure, both for identifying what sums they are required to pay and, if more than that is collected, for obtaining a refund of the excess. *Hudson*, 475 U.S. at 306-09. For convenience, we will refer to the first of these as the substantive First Amendment right and to the second as the procedural First Amendment right.

A. The Substantive First Amendment Right

The Supreme Court in *Ellis* announced a few of the basic rules for safeguarding nonmembers' substantive First Amendment right. An absolute baseline is that nonmembers may never be charged more than is needed to cover "expenditures [which] are necessarily or reasonably incurred" in collective bargaining. 466 U.S. at 448. Moreover, money collected from nonmembers may not be used, even temporarily, for ideological purposes, lest they be forced to make "an involuntary loan" which the union can use to promote its political ends. *Id.* at 444. In a passage highly relevant to our case, *Ellis* observed that, to avoid forced subsidies forbidden by the First Amendment, unions must adopt procedures "such as advance reduction of dues and/or interest-bearing escrow accounts." *Id.* Taking our lead from *Ellis*, we conclude that the District's escrow scheme poses no risk that plaintiffs' substantive free speech rights will be violated.[2]

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[2] In so holding we join the Second, Third, Fourth and Eleventh Circuits which have held that escrow accounts obviate the need for advance reductions. *See, e.g., Gibson v. The Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990), *cert. dismissed*, 112 S. Ct. 633 (1991); *Crawford v. Air Line Pilots Ass'n Int'l*, 870 F.2d 155, 161 (4th Cir. 1989); *Hohe v. Casey*, 868 F.2d 69, 72 (3rd Cir.), *cert. denied*, 493 U.S. 848 (1989); *Andrews v. Education Ass'n*, 829 F.2d 335, 339 (2nd Cir. 1987). The Sixth Circuit has held that unions must reduce nonmember fees in advance by at least the amount unquestionably dedicated to ideological expenses. *See Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir.

All of the agency fees collected from nonmember employees go into an escrow account; this precludes any dispute about whether the amount placed in escrow is adequate. Any nonmember seeking a rebate of the $80 that would be used for nonrepresentational purposes need only advise the union in writing by November 15. Provided the employee accepts the union's apportionment, the union pays out the $24 already collected by December 7. In addition, it also pays an up-front rebate of the $56 that will be deducted from the employee's paycheck over the next seven months. An objecting employee who questions the apportionment can force the union to arbitrate the matter, with the union paying the cost of the arbitrator. The arbitration takes place in December, and the objecting employee's account is settled by sometime in mid-February. By then, the objector has contributed $40 to the escrow account. He gets the $40 back with interest, plus $40 as an advance payment of the fees that will be deducted from his paycheck during the remaining five months of the school year. In either case, none of the objectors' money is or can be used by the union for ideological purposes. To the contrary, the objector actually makes a small profit.[3] The long and short of

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1987); *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987). As we explain in the text, we read *Hudson* as allowing the union more flexibility.

[3] Assuming an interest rate of 10%, a non-arbitrating employee loses about 25 of interest on the $24 put in escrow over the first three months. Because of the advance rebate, however, he gets what is essentially an interest free loan of $56 that he pays off through paycheck deductions over the next seven months. At the same interest rate, the rebate would be worth about $1.75 in advance interest, for a profit of roughly $1.50. The employee who goes to arbitration still makes a profit, albeit a less munificent one. Assuming the arbitrator upholds the union's calculations, by sometime in mid-February the employee receives $40 with interest, which compensates him for the lost use of the money while it was in escrow. However, he also gets an advance rebate of $40 to compensate for the $8 a month that will be deducted from his paycheck over the next five months. This advance yields an economic profit of about 80. While these sums are too small to be of practical significance, what matters is that the procedure adopted gives the objecting employee the benefit of any

it is that plaintiffs cannot establish a substantive free speech violation because none of their money is used, or ever can be used, by the union for non-representational purposes.

Plaintiffs nevertheless argue that they suffer a substantive First Amendment injury because they are denied use of their money temporarily, so they can't use it to promote First Amendment causes they support. We seriously doubt that this states a First Amendment injury at all, particularly where plaintiffs are either given an advance rebate or paid interest on their money to make up for lost use. Any other conclusion would turn every tax refund suit—indeed every monetary claim against an entity acting under color of law—into a First Amendment case.[4]

In any event, to the extent plaintiffs have suffered an injury it is of a much different character than that contemplated by *Abood*, *Ellis* and *Hudson*. Those cases categorically prohibit only one type of First Amendment harm: use of nonmembers' money to promote causes they do not believe in. The Supreme Court has recognized in those cases and others that this type of injury is particularly grave: To be forced to promote a cause or express sentiments that run contrary to one's conscience is painful in addition to being unjust. This sort of compelled contribution is forbidden under a broad First Amendment

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imprecision in the calculation process.

[4] Surprisingly, this theory is not without support in the case law. The Sixth Circuit embraced such a claim in *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987), and one pre-*Hudson* Ninth Circuit case seems to have considered the unavailability of funds as a factor in establishing First Amendment harm. *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970) (dictum). For the reasons explained in the text, we decline to follow the ill-advised ruling of the Sixth Circuit. And in the two decades that the *Seay* dictum has been on the books, it has never been followed; its precedential effect has been dissipated by the Supreme Court's intervening ruling in *Hudson*. *See Jerabek v. Public Employment Relations Bd.*, 2 Cal. App. 4th 1298, 1309, 4 Cal. Rptr. 2d 181, 187 (1992) (declining to follow *Seay* dictum for the same reason).

protection which the Court has called the "individual freedom of mind." *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). The agency shop agreement we test here does not inflict this type of First Amendment harm. As to other types of injury plaintiffs may suffer, *Abood*, *Ellis* and *Hudson* require only a reasonable accommodation. We consider next whether the procedure adopted by the District provides such a reasonable accommodation of plaintiffs' remaining interests.

B. The Procedural First Amendment Right

Even if nonmembers' money can't be used by the union for nonrepresentational purposes, their rights may still be infringed by a deduction-escrow-refund procedure, unless the procedure serves a legitimate purpose and is administered in a fair and impartial fashion. Requiring agency fee payers to go through the inconvenience, embarrassment and delay of recovering even a small sum—practically a sum so small it's hardly worth the hassle—is a burden they cannot be required to bear, unless there's a compelling reason for requiring it and the procedure itself is reasonable.

Hudson provides significant guidance in judging the adequacy of the procedure adopted here. Though *Hudson* noted with approval that the union had created an escrow account to hold 100% of the funds collected from dissenters, the Court commented that an "agency shop agreement itself impinges on the nonunion employees' First Amendment interests, ... because[, for example,] the nonunion employee has the burden of objection." *Hudson*, 475 U.S. at 309. In the end the *Hudson* court struck down the escrow arrangement offered as a remedy because it remained "flawed in two respects. It [did] not provide an adequate explanation for the advance reduction of dues, and it [did] not provide a reasonably prompt decision by an impartial decisionmaker." *Id.*

We interpret this language in *Hudson* as expressing a strong preference for identifying nonunion members early enough so

that the deduction-escrow-refund procedure can be avoided altogether. To employ the more cumbersome and intrusive deduction-escrow-refund procedure, the union must provide an "adequate explanation," which we interpret to mean that the union must show that the preferred method of doing things is impossible or, at any rate, far more costly or cumbersome.[5] Moreover, where a deduction-escrow-refund procedure is employed, the refund procedure must be reasonably prompt; the employee must be given sufficient information from which to judge the adequacy of the refund;[6] and, if the challenging employee so chooses, the amount of the refund must ultimately be decided by an impartial decisionmaker.

As to the first inquiry, the union has provided what we consider to be an adequate explanation for resorting to the deduction-escrow-refund procedure: Public school teachers are employed on a school year by school year basis. Virtually all new employees begin work at the same time—around September 1, when the academic year starts. During September, the District and the union first learn two pieces of information necessary to the administration of the agency shop agreement: the home addresses of all new teachers and, most importantly, the names of the teachers who choose to be agency fee payers that year. Thus, the end of September is the earliest point at which the SBTA can identify all agency fee payers and notify

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[5] The "adequate explanation" language in *Hudson* arguably relates only to the notice requirement; however, *Hudson* does "require[ ] that the procedure be carefully tailored to minimize the infringement" upon nonmembers' First Amendment rights. 475 U.S. at 303. We therefore interpret *Hudson* to require that the union give reasons for failing to provide an advance reduction.

[6] We do not address the adequacy of the notice provided by the union. *See Hudson*, 475 U.S. at 306-07. The district court found that the information gave plaintiffs adequate notice, Order Re Preliminary Injunction, ER at Tab 10, at 2, and plaintiffs do not challenge that finding on appeal.

them of their right to a refund.[7] The union, in fact, sends out a notice to agency fee payers advising them of their rights no later than October 15.

Under the circumstances it would be highly impractical for the union to separate members from nonmembers and determine the affiliations and addresses of the new teachers before the first monthly paycheck, which comes at the end of September. *See* Stipulation of the Parties at 16; Brief of Defendant-Appellee San Bernardino Teachers Association at 9 n.11. Because the procedure is reasonable in light of the annual and fluctuating nature of elementary school employment and the burden on agency fee payers is relatively slight, we hold that this is the type of "appropriately justified advance reduction" approved by the Court in *Hudson*. 475 U.S. at 309.

The scheme scrutinized here also satisfies the twin requirements that nonmembers be provided with a "reasonably prompt

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[7] It is possible, of course, to devise a more complex system that would minimize further the burden on agency fee payers. For example, the union might operate under the assumption that those teachers who opted to be agency fee payers in one year would want to continue to be agency fee payers in the next—a plausible, but not a necessary, inference. We are hard pressed to say, however, that the Constitution requires the school district and the union to bear the additional administrative burden of operating a two-tier system (one tier for continuing employees, another for new employees and those who wish to change their status). The test, after all, is not whether the union and the school district have come up with the system that imposes the least burden on agency fee payers, regardless of cost (a test no system could possibly satisfy); rather, we inquire whether the system reasonably accommodates the legitimate interests of the union, the school district and nonmember employees. Even the dissent concedes an escrow system is necessary as to some employees—new teachers and existing teachers who change from union status to agency fee payers. The narrow question dividing us is whether the district may extend that procedure to all employees in order to maintain a uniform classification system. The dissent disagrees with our assertion that a two-tier system would be more costly and cumbersome, but we think common experience supports our position.

decision by an impartial decisionmaker." *Id.* The scheme adopted here was foreshadowed in *Hudson*:

> [A] full-dress administrative hearing, with evidentiary safeguards, [need not be] part of the "constitutional minimum." Indeed, we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice.... [S]election of an arbitrator frequently does not represent one party's unrestricted choice from a list of state-approved arbitrators.

Id. at 308 n.21. Regarding the "impartial decisionmaker," providing for selection of an arbitrator by the AAA does not rise to the level of "unrestricted union choice" forbidden by *Hudson*. Other Circuits agree. *See, e.g., Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1373 (7th Cir. 1989) (plan which calls for AAA selection of an arbitrator satisfies *Hudson*'s requirement); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987) (same); *Andrews v. Education Ass'n*, 829 F.2d 335, 340 (2nd Cir. 1987) (same). Though some have argued that the AAA's origins reveal a pro-union undercurrent, *see Andrews*, 829 F.2d at 340, plaintiffs raise no such contention here.

The refund also appears to be reasonably prompt. If the employee does not object to the union's apportionment, his account is settled by December 7. If he does object, arbitration must begin no later than December 15, a month after the end of the objection period. The arbitrator must issue his decision within a month of the close of the proceedings. Within twenty days from the date of the decision, the union must pay back any rebatable portion of the objectors' dues. The only variable in the schedule is the length of the hearing itself. Since the issues are relatively narrow and the union bears the cost of the arbitrator as well as its own representation expenses, we have no reason to believe that the proceeding will be anything but prompt. Because the arbitration timetable is appropriately speedy, and plaintiffs do not claim that the deadlines aren't

being met, we hold that the objection process does not impermissibly impinge on plaintiffs' First Amendment rights.

II

Though individually plaintiffs have very little money at stake in this litigation, they obviously find themselves in an uncomfortable position: They are represented by a union they do not support and to which they are, nevertheless, forced to contribute a portion of their income. It adds insult to injury for them to be deprived, even temporarily, of additional funds to which they are rightfully entitled. This concern is legitimate. But the union has legitimate interests as well. Under applicable law, the union is the bargaining unit's lawful representative, and it is entitled—indeed required—to collect from everyone in the unit a pro rata portion of the funds it expends on representational activities.

Ideally, of course, the union would collect from nonmembers only that amount used for representational purposes. But that is not so easy to accomplish in practice. Here, the union has advanced a legitimate reason for the procedure it has adopted: Its ranks and the ranks of the agency fee payers change from year to year. Mindful of this fact, the union has come up with a procedure that strikes a proper balance between the union's right to charge fees for collective bargaining activities and the plaintiffs' First Amendment right to be free from forced contribution to causes with which they disagree. Tyranny of the majority this is not.

AFFIRMED

BRUNETTI, Circuit Judge, dissenting.

The only issue before us in this case is the constitutionality of the "deduction-escrow-refund" procedure used by the District and the Union to collect agency fees from the nonunion teachers, the agency fee payers. The precise question is whether the District can deduct the full union dues from agency fee

payers' paychecks in September and not pay a rebate to the objecting fee payers until December 7 at the earliest. To state it another way, can the District deduct nonchargeable amounts from fee payers' paychecks and hold them in escrow for four months?

As the majority notes, a union may satisfy the requirements of the First Amendment by adopting procedures "such as advance reduction of dues and/or interest-bearing escrow accounts." *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 444 (1984). However, *Ellis* did not set forth the standards that reviewing courts should apply to decide when the use of such procedures is justified.

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Supreme Court addressed the first of these options, advance reduction of dues, and identified three conditions that an advance reduction procedure must satisfy. First, it must provide nonmembers with an "adequate explanation" of the basis for calculating the agency fee so that potential objectors have the means to determine whether that fee is in fact fairly calculated. *Id.* at 310. Second, if a nonmember objects to the calculation, the procedure must provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." *Id.* Finally, the procedure must provide "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.*

The procedure at issue here, however, is not "an advance reduction of dues" (the first *Ellis* option), but rather an "interest-bearing escrow account" (the second *Ellis* option). The District deducts from the fee payers' paychecks the full amount of union dues; it does not provide for an "advance reduction" as did the teachers' union in *Hudson*. For this reason, the majority's statement that "this is the type of appropriately justified advance reduction approved by the Court in *Hudson*" is erroneous. We therefore cannot directly apply the *Hudson* criteria to this procedure. Because the Supreme Court has not set forth the standards that reviewing courts should use to judge

the validity of *Ellis* interest-bearing escrow accounts, we must do so ourselves.

The majority opinion sets forth a two-pronged test. First, the Union must provide an "adequate explanation" for using the deduction-escrow-refund procedure: "The union must show that the preferred method of doing things is impossible or, at any rate, far most costly or cumbersome." The majority notes in n.5 that this "preferred method" is the "advance reduction" procedure itself, because this procedure is less of an infringement on nonmembers' First Amendment rights. If the Union satisfies the "adequate explanation" requirement, it must then make its procedure as fair and rapid as possible by satisfying the conditions that *Hudson* imposes on advance reduction plans. I agree with the second prong, but I disagree with the majority's statement and application of the first prong.

The issue involved has been defined by the court in *Abood*, that nonunion employees do have a constitutional right to prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. *Hudson*, 475 U.S. at 302. The objective in devising a procedure for collecting the appropriate amount from nonunion employees must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object, without restricting the Union's ability to require every employee to contribute the cost of collective-bargaining activities. *Id.* 302.

The "agency shop" is already a "significant impingement" on employees' constitutional rights. *Ellis*, 466 U.S. at 455. The First Amendment requires that the fee collection procedure be carefully tailored to minimize further infringement on agency fee payers' rights, and the nonunion employee whose First Amendment rights are affected must have a fair opportunity to identify the impact of government action on his interests and to assert a meritorious First Amendment claim. *Hudson*, 475 U.S. at 303. The District and the Union accordingly have a responsibility to provide procedures that minimize the impingement and that

facilitate a nonunion employee's ability to protect his rights. *Id.* at 307, n.20. Advance reduction of dues and/or interest-bearing escrow accounts are acceptable procedures. *Id.* at 304.

As to the second prong, the procedure adopted by the District and the Union meets the *Hudson* tests because the notice given on October 15 gives the fee payers an adequate explanation of the basis for the Union calculation of the fee and the arbitration procedure provides a prompt and fair opportunity to challenge the calculation before an independent decision-maker. Where the procedure fails is that it is not "carefully tailored to minimize the infringement" on nonmembers' First Amendment rights, because for four months it deprives the fee payer of amounts that are to be refunded. The District and the Union fail to justify their failure to use procedures which they have already tried or considered which impinge less on the fee payers' rights.[1] In fact, the procedure as adopted is obviously for the convenience of the District and the Union with no consideration of the infringement on the fee payers' rights.

The majority asserts that "the end of September is the earliest point at which the [Union] can identify agency fee

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[1] The District and Union developed this deduct-escrow- refund procedure after trying and rejecting an advance reduction of dues system, and considering and rejecting a system using an October 15 notice and delay in collection of the fee until the end of December. *See Stipulation of the Parties* at 16-17.

The advance reduction system was dropped as unworkable because several school districts refused to deduct a different amount for agency fees than for member dues, and, further, the reduced fee would require *Hudson* notices at least thirty days prior to the first deduction so that the identity of the objecting fee payers could be identified. *Id.* at 17.

The delayed collection option was not adopted because it would deprive the unions and affiliated locals of any agency fees for four months each year and, in addition, fee payers would have to pay a much larger amount each month for the rest of the school year to recoup amounts owed for the four months when deduction did not take place. The Union was concerned that this unequal deduction (compared with union members fees deducted over ten months) might raise equal protection claims. *Id.* at 17-18.

payers and notify them of their right to a refund," and that therefore it would be impossible or at least highly impractical to reduce nonmembers' dues in advance. The majority also notes in n.7 that the Union could further minimize the burden on agency fee payers by assuming that "those teachers who opted to be agency fee payers in one year would want to continue to be agency fee payers in the next," but that the Constitution does not require the Union to take on the burden of doing so.

However, the evidence indicates that the Union already operates under this assumption, and that therefore it cannot provide an "adequate explanation" for failing to use an advance reduction procedure. The Union knows at the beginning of each school year who the existing agency fee payers are; it just doesn't know which of the new teachers will decide to join their ranks. *See* Stipulation of the Parties at 16 ("new teachers are typically given 30 days to decide whether to join the Union or become a fee payer.") (emphasis added). The Union assumes that existing fee payers will continue to desire that status. *See* Exhibit 9 to Stipulation at 166 ("[a]t the beginning of the fiscal year, CTA shall place into an independently-managed interest-bearing account all CTA and NEA agency fees received from fee payers.") (emphasis added); Exhibit 10 to Stipulation at 168 ("[f]rom the start of this school year, CTA has been placing all CTA and NEA agency fees received into an interest-bearing escrow account.") (emphasis added). Clearly, then, the Union could use an "advance reduction" procedure for existing fee payers and a deduction-escrow-refund type procedure for new teachers who later choose to become agency fee payers.

The Union proffers several reasons for its refusal to use such a system. First, it states that it doesn't know teachers' new addresses until the end of September. This would not hamper the operation of the two-tier procedure, because the Union doesn't need to know addresses to reduce the deduction from the agency fee payers' paychecks.

Second, the Union states that such a procedure would be problematic because several school districts have in the past

refused to deduct a different amount for agency fees than for agency dues. However, this refusal alone cannot satisfy the "adequate explanation" test. This is like the District refusing to follow *Brown v. Board of Education*, 349 U.S. 294 (1955), because integration imposes too much of an administrative burden.

Third, the Union claims that the use of a two-tier system would require that *Huason* notices be sent at least thirty days prior to the first deduction so that the identities of the objecting fee payers could be determined. Not so. While the *Hudson* notices would be required to determine which fee payers objected to the Union's calculation of the advance reduction, they would not be required to calculate the advance reduction and apply it to existing fee payers' paychecks. Operating the two-tier procedure would require only that *Hudson* notices be sent out at the same time they are now.

Fourth, the Union states that the "only other option" would be to send out the notices on October 15 and delay collection of the fee until December. Again, not so. Collection of the appropriately reduced fee could begin immediately as the parties have stipulated to what the October 15 notice is to contain including the estimated chargeable and estimated nonchargeable expenditures of the Union. *See* Stipulation of the Parties at 3. Furthermore, the Union is already "deprived" of the agency fees for four months of each year (because the fees go straight into escrow and do not come out until rebates are paid), so the argument that a two-tier system would cause such an effect does not hold water.

In sum, the Union has not justified its failure to use such a procedure. The majority baldly asserts that "the Constitution [does not] require[ ] the school district and the Union to bear the additional administrative burden of operating a two-tier system" without citing any evidence that such a system would impose any extra burden. There are other procedures recognized and rejected by the District and the Union which would minimize the infringement on the fee payers, and no adequate

reasons other than convenience to the District and the Union have been advanced for failing to use those less impinging systems.

The District's deduct-escrow-refund procedure fails to protect the fee payers' constitutional rights as identified in *Hudson*, and the district court's decision finding the plan constitutional should be reversed.

ORDER OF THE UNITED STATES

COURT OF APPEALS FOR THE

NINTH CIRCUIT

June 9, 1992

[965 F.2d 804]
Debra J. GRUNWALD, et al.,
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SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, et al., Defendants-Appellees.

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Before: D.W. NELSON, BRUNETTI and KOZINSKI, Circuit Judges.

ORDER

Judges Nelson and Kozinski voted to grant the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Brunetti voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The petition for rehearing is GRANTED and the suggestion for rehearing en banc is REJECTED.

The opinion, filed October 31, 1990, 917 F.2d 1223, is hereby WITHDRAWN. A new opinion will be filed.

OPINION OF THE UNITED STATES

COURT OF APPEALS FOR THE

NINTH CIRCUIT

October 31, 1990

[917 F.2d 1223]

Debra J. GRUNWALD; Lewis N. Adams; Vicki S. Burdeaux; Maria Buselle, et alii, Plaintiffs-Appellants,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT; Shelby Obershaw, President, SBCUSD; Hardy L. Brown, Vice President, SBCUSD; Elisa Diaz, School Board Member, et alii; San Bernardino Teachers Association, CTA/NEA, Defendants-Appellees.

Debra J. GRUNWALD; Lewis N. Adams; Vicki S. Burdeaux; Maria Buselle, et alii, Plaintiffs-Appellees,

v.

SAN BERNARDINO TEACHERS ASSOCIATION, CTA/NEA, Defendant-Appellant.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 29, 1990.

Decided Oct. 31, 1990.

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[1224]Before NELSON, BRUNETTI and KOZINSKI, Circuit Judges.

BRUNETTI, Circuit Judge:

Debra Grunwald and 48 other non-union teachers ("teachers") filed suit in the district court under 42 U.S.C. § 1983 alleging that the procedure by which the San Bernardino Teachers Association ("SBTA") and the San Bernardino City Unified School District ("the District") collected agency shop fees violated their first and fourteenth amendment rights. The district court entered a permanent injunction upholding the method of the collection of agency shop fees as constitutional. The court also ordered the District to provide rebates to teachers who had not formally objected to the fees. The teachers appeal the district court's failure to enjoin the collection of the fees, and SBTA cross-appeals the district court's order to pay rebates to the teachers.

[1225]*FACTS AND PROCEEDINGS BELOW*

Plaintiffs-teachers are employed by the defendant San Bernardino City Unified School District. They are not members of the defendant San Bernardino Teachers Association, the exclusive collective bargaining representative for teachers in the District.

SBTA and the District have an agency shop agreement. An agency shop agreement requires non-union members to pay a fee to the union for acting as their bargaining representative. Teachers who choose not to join the SBTA are required to pay an agency fee to the SBTA in order to offset their pro rata share of the costs of representation. These agency fees are deducted by the District on a 10-month basis, corresponding to the 10-month school year during which teachers are paid, with the first deduction occurring on September 30 and the last on June 30. Initially, each deduction made by the District is in the amount of one-tenth of the annual membership dues. If a nonmember objects to the amount of the fee, he/she eventually pays a reduced fee that excludes the portion attributable to matters unrelated to collective bargaining expenses.

The teachers concede that agency fee arrangements can be constitutional, but argue that the procedures for collecting the

fee and amount of the fee violate their constitutional rights. The SBTA procedure provides that from the start of the year, all agency fees will be placed into an independently managed interest-bearing escrow account.[1] By October 15, a notice is sent to all fee payers. The notice advises them of their right to receive a rebate for the portion of the fee that is not attributable to collective bargaining expenses and explains how a fee payer requests a rebate. The objection procedure requires the teacher to send a letter to the California Teacher's Association's Membership Accounting Department. The notice also provides the SBTA's calculation of the percentage of dues that the SBTA believes to be "chargeable," with detailed back-up material.[2]

The notice explains that from the start of the school year the SBTA will place all agency fees received into escrow, but that an individual's fees will be released from escrow if he or she does not submit an objection by November 15. If the individual does object, he or she may either (i) accept the SBTA's calculation of the chargeable percentage, in which case a rebate is issued by December 7 for the entire year; or (ii) request the opportunity to have the amount of the fee determined in arbitration before a neutral decisionmaker, in which case a rebate check is not sent until after receipt of the arbitrator's decision.

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[1] The description that follows is of the procedure in effect for the 1987-88 school year. [Stipulation, Ex. 9] Plaintiffs' lawsuit dealt with the 1986-87 year as well as 1987-88, but the parties agreed that for purposes of determining whether a permanent injunction should be entered, the relevant procedure to be considered was that for 1987-88. [RT 62, page 15] No issue is presented on appeal regarding the 1986-87 procedure, other than whether the district court was correct in treating the filing of the lawsuit as a proper substitute for the filing of objections under the SBTA's procedure.

[2] The district court specifically found that the information provided in the notice is adequate [CR 10, p. 2 ER], and plaintiffs do not contend otherwise.

Under the SBTA's procedure, in 1987-88 those fee payers who objected to paying the full fee but who accepted the SBTA's determination of the chargeable portion received their rebate by early December. At that point they had only paid three-tenths of the total annual agency fee (via deductions at the end of September, October and November). They were issued rebate checks in the amount of the non-chargeable portion of the entire year's fee. The fees received from those objectors who did not accept the SBTA's determination of the chargeable amount remained in escrow until the dispute could be resolved through arbitration, which took place on January 11 through 16, 1988. Objectors received rebate checks for the entire year before the April 30 fee deduction.

Under the agency fee agreement, the SBTA requested payment from non-union teachers in February, March and April of [1226]1987. Plaintiffs-teachers requested no deduction be made. Deductions were to begin in May of 1987. The teachers filed this § 1983 suit in May, requesting a temporary injunction against the collection of the fees and damages. The district court refused to enjoin the collection of fees but issued a temporary restraining order requiring the SBTA to place all agency fees collected in an escrow account.

In June, the district court issued a preliminary injunction ordering the SBTA to place the fees in an escrow account. The court found that the SBTA's procedures in collecting the agency fees, which included giving no advance notice of the deduction and initially deducting fees equal to 100% of union dues, were constitutional. In July, both parties waived a full trial. The teachers filed a motion for a permanent injunction. The court, in looking at the 1987-88 fee deductions and rebate procedures, again refused to enjoin the collection of the fees. It found the SBTA's procedures were constitutional.[3] The court also

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[3] The court did order the SBTA to include language in its procedural notice that said the union bears the burden of proof on the issue of what percentage of fees is chargeable to collective bargaining. This part of the

ordered the SBTA to pay a rebate to the teachers who filed the complaint because the court found the complaint substantially complied with the formal objection procedures required by the SBTA.

The teachers appeal the denial of the injunction, claiming the SBTA's collection procedures are unconstitutional. The SBTA cross-appeals the order to pay rebates. The District joins in the SBTA's arguments against rebates.[4] We reverse in part and affirm in part.

STANDARD OF REVIEW

A district court's conclusions on questions of law that implicate constitutional rights are reviewed de novo. *Wood v. Sunn*, 865 F.2d 982, 986 (9th Cir.1988).

DISCUSSION

I. Constitutionality of Fee Collection Procedure

The teachers argue that the District's procedure for the collection of agency shop fees violates their first and fourteenth amendment rights because the procedure by which SBTA collects the nonmember fees does not satisfy the requirements set out by the Supreme Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). Specifically, the teachers argue the deduction procedure violates their constitutional rights because the fee deducted is equal to

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court's judgment was not contested.

[4] The District also seeks enforcement of an indemnity agreement between SBTA and the District. The District did not cross-claim against the SBTA for indemnity below. Generally, we will not consider issues raised for the first time on appeal. *In re Wind Power Systems, Inc.*, 841 F.2d 288, 290 n. 1 (9th Cir. 1988). Therefore, we will not address the merits of the District's arguments regarding the indemnity agreement.

100% of members' dues and no notice is given before the deductions occur.

The district court ruled the agency fee procedure was constitutional. The court held that *Hudson* does not require advance reductions in the amount of fees collected because the 100% escrow of all nonmember funds until the proportion of chargeable expenditures is determined satisfies the constitutional requirement that nonmember fees not be used for ideological purposes by the SBTA. The court also found that no advance notice of the agency fee deductions was required to satisfy *Hudson*.

The Supreme Court has recognized that a union representing public employees has a right to require nonunion employees to contribute to the union's cost of collective bargaining as a condition of employment. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301, 106 S.Ct. 1066, 1073, 89 L.Ed.2d 232 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232, 97 S.Ct. 1782, 1798, 52 L.Ed.2d 261 (1977). In *Hudson*, the Court acknowledged that the collection and expenditure of union fees implicate nonunion employees' first amendment rights, both by forced subsidization of ideological views and by interference with the [1227]freedom of association.[5] *Hudson*, 475 U.S. at 301, 106 S.Ct. at 1073. In striking a balance between the union's and the nonunion employees' rights, "'the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the

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[5] Plaintiffs argue that their case also implicates the fourteenth amendment and due process. The Supreme Court, however, analyzes agency fee procedures in terms of the first amendment. *Hudson*, 475 U.S. at 304 n. 13, 106 S.Ct. at 1074 n. 13. "We are convinced that ... the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Id.*

cost of collective bargaining activities.'" *Id.* at 302, 106 S.Ct. at 1073 (citations omitted).

The Court found that certain procedural safeguards must be incorporated into the collection procedure to achieve this objective and identified three procedural requirements a plan must meet in order to protect the nonunion members' constitutional interests. First, the procedure must avoid the risk that nonunion members fees will be used, even temporarily, to finance ideological activities unrelated to collective bargaining. *Id.* at 305, 309, 106 S.Ct. at 1075, 1077. Second, the plan must also provide nonmembers adequate information of the basis for the calculation of the proportionate fee. *Id.* at 306, 106 S.Ct. at 1075. Lastly, the nonmembers must be given a reasonably prompt opportunity to challenge the amount before an impartial decision maker. *Id.* at 307, 106 S.Ct. at 1076.

The teachers contend that the SBTA's procedure is unconstitutional because it fails to satisfy two of the procedural requirements set out in *Hudson*. The teachers argue the procedure fails to satisfy the first prong of *Hudson* because SBTA does not give advance reductions in fees, and that the plan fails to fulfill the second *Hudson* requirement because notice is not given before any deductions are made.

A. *Advance Reduction.*

The teachers first argue that SBTA's failure to reduce the agency fee assessed by an amount equal to the percentage of funds not attributable to collective bargaining activities violates *Hudson*, even though the SBTA procedure does escrow 100% of the fees paid by nonmembers until the period for objection has passed.

The circuits differ over whether the advance reduction of fees is required by *Hudson* when the union escrows the fees. Compare *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-03 (6th Cir.1987) (advance reduction required), with *Crawford v. Airline Pilots Ass'n Int'l*, 870 F.2d 155, 161 (4th Cir.1989) (no advance

reduction required if fees escrowed), *Hohe v. Casey*, 868 F.2d 69, 72 (3rd Cir.1989) (no advance reduction required if fees escrowed), *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 339 (2d Cir.1987) (100% escrow satisfies *Hudson*), and *Gibson v. The Florida Bar*, 906 F.2d 624 (11th Cir.1990) (no advance reduction necessary).

In *Tierney*, the Sixth Circuit found advance reductions were required to satisfy *Hudson*'s first procedural requirement that the union procedure for collecting agency shop fees from nonunion members must avoid the risk that nonmembers' funds may be used temporarily for an improper purpose. *Tierney*, 824 F.2d at 1502. The *Tierney* court held that *Hudson* does not allow the union to compel a nonunion employee to contribute any sum, even if placed in escrow, which unquestionably represents ideological expenses of the Union, and stated that "the Supreme Court's approval of 100% escrow as satisfying *Hudson*'s first requirement refers to escrowing 100% of the remaining, non-clearly ideological proportion of the fee which the union may collect." *Id.* at 1504. Therefore, they concluded a union must reduce the amount of fees collected by the amount of its ideological expenditures before it collects the agency shop fee—an advance reduction. *Id.* at 1502-03.

We agree with *Tierney* and hold that advance reductions of agency shop fees are required by *Hudson* even where **[1228]** the agency fee procedure includes an escrow of 100% of the collected agency fees.[6] Because the collection of agency shop

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[6] The circuits that have disagreed with *Tierney* and permitted 100% escrow of fees have done so largely in reliance on *Hudson*'s language which holds that among the "constitutional requirements for the Union's collection of agency fees" is "an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310, 106 S.Ct. at 1077. This was never meant to imply either that 100% of fees could be escrowed absent adequate procedural safeguards or that funds clearly marked for use on representational activities are required to be escrowed. Instead, the *Hudson* court's language merely indicates that any amount "reasonably in dispute," i.e., that portion of an agency fee which is neither clearly to be used for representational purposes

fees infringes nonunion employees' First Amendment rights, the procedure for the collection of the fees must be carefully tailored to minimize the infringement. *Hudson*, 475 U.S. at 303, 106 S.Ct. at 1074. In order to be carefully tailored, the union must deduct only the amount it is entitled to, i.e. the amount arguably related to its collective bargaining expenses.

The SBTA's procedure is not carefully tailored to minimize any infringement. The SBTA collects an agency fee equal to 100% of the union dues, thereby collecting more than they are entitled to since only some of the dues are attributable to collective bargaining expenses.[7] The SBTA can only deduct a reasonable estimate of the percentage of fees attributable to collective bargaining. Thus, the SBTA must first determine the percentage of union expenses spent on activities unrelated to collective bargaining and then calculate the advance reduction from the nonmembers' dues before it can make any deductions.

An agency fee collection procedure must include advance reductions and because SBTA's procedure does not provide for advance reductions, it is constitutionally infirm.

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nor for prohibited ideological activities, must be placed in escrow. *See id.* at 309-10, 106 S.Ct. at 1077.

[7] The dissent contends that the disputed dues only amount to eight dollars per month and therefore the entire dispute does not belong in the courts. The money at stake in *Hudson* was seventeen dollars a month. Denying teachers here an opportunity to challenge the union's actions in court simply because their claim involves nine dollars less than the *Hudson* teachers' would improperly place a pricetag on constitutional rights. The *Hudson* court specifically decried such an approach, stating that "[t]he amount at stake for each individual [should] not diminish ..." any constitutional concerns. 475 U.S. at 305, 106 S.Ct. at 1075.

Nor should the teachers be denied their day in court because their claims arise from their political differences with the union, as the dissent also contends. The teachers' claims may have political undertones, but this is true of many first amendment claims which the courts continually hear.

B. *Notice.*

Plaintiffs also argue that the SBTA's plan is unconstitutional because notice is not given in advance of the first deduction of fees from the teachers' pay checks as required by the second prong of *Hudson*. The district court rejected this argument because it found *Hudson* did not require advance notice.

Tierney required unions to give notice before any fees are deducted in order to fulfill *Hudson*'s second requirement of providing nonmembers with adequate information to contest the fee. *Tierney*, 824 F.2d 1497 at 1503 (6th Cir.1987). Advance notice must be given to protect the nonmember's first amendment interest—a fair opportunity to identify the impact of the government action on his interests and assert a meritorious first amendment claim. *Tierney*, 824 F.2d at 1503.

We agree with *Tierney* and hold that notice of and adequate information concerning the agency fee must be given to all nonmembers *before* any fees may be collected from them. *Id.* at 1503. *Hudson* requires the union to give "*potential* objectors ... sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1075 (emphasis added). If the SBTA must notify "potential" objectors by sending out notice of the agency fee before the first deduction is made, then the failure of the SBTA's procedure to give advance notice of the agency fee deduction renders the plan unconstitutional.

[1229]II. Rebates to Teachers Who Did Not Comply With Objection Procedure

SBTA's agency fee collection procedure sets out specific steps for objecting fee payers to follow to receive a rebate. The procedure requires a fee payer to send a letter to the SBTA indicating that the fee payer objects to his fee being spent on nonchargeable activities and requesting a rebate. The Union argues the teachers failed to comply with the objection procedure and are thus not entitled to rebates.

The teachers in this case did not send an objection letter to the SBTA. Instead, they filed suit on May 27, 1987, one day before the SBTA sent out its *Hudson* notices that outlined the right to object. The district court found that the teachers had substantially complied with the notice requirement for objections because plaintiffs' complaint objected to the agency fee collection procedure as unconstitutional. We agree. The court ordered the SBTA to pay rebates to all plaintiffs for the 1986-87 school year.

The Supreme Court has clearly held that the nonunion employee has the burden of raising an objection. *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1075. "The nonmember's 'burden' is simply the obligation to make his objection known." *Id.* at 306 n. 16, 106 S.Ct. at 1076 n. 16. Prior to *Hudson*, in *Brotherhood of Railway & Steamship Clerks v. Allen*, 373 U.S. 113, 119, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963), employees opposed to the use of union security fees did not object to the union but filed suit instead. The Supreme Court found that the complaint served as a sufficient notice of objection. *Id.* at 119, n. 6, 83 S.Ct. at 1162, n. 6. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 241, 97 S.Ct. 1782, 1802, 52 L.Ed.2d 261 (1977), the Supreme Court again found that sufficient notice of objection was given by the nonunion employees' complaint, which alleged that they were opposed to the union's use of fees for causes unrelated to collective bargaining.

While both *Allen* and *Abood* involved disputes where the unions did not have objection procedures in place at the time the lawsuits were filed, in *Hudson* the Supreme Court appeared to endorse a complaint as providing adequate notice despite the fact that the union did have an objection procedure. In *Hudson*, the union had an objection procedure established at the time the nonmember employees filed their lawsuit. *Hudson*, 475 U.S. at 296, 106 S.Ct. at 1070. There were seven plaintiffs in the case, three of whom did not file a formal objection according to the procedure. *Id.* at 297, 106 S.Ct. at 1071. The Court found the union's procedure unconstitutional and remanded the case to the district court to determine an adequate remedy for all the

plaintiffs, not just the four who formally objected. *Id.* at 310, 106 S.Ct. at 1077. Thus, a complaint may provide sufficient notice of objection.

In this case, the teacher's complaint challenged the constitutionality of the SBTA's plan, giving the SBTA sufficient notice of their objection to the collection of fees.

III. Attorney's Fees

The teachers request attorney's fees. 42 U.S.C. § 1988 authorizes the court to award attorney's fees to prevailing parties who bring suit under one of several statutes, including 42 U.S.C. § 1983. The Supreme Court defined "prevailing party" in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* at 433, 103 S.Ct. at 1939. The teachers in this case are prevailing parties as they succeeded in having the SBTA's procedure declared unconstitutional. Thus, they are entitled to attorney's fees in an amount to be determined by the district court on remand.

CONCLUSION

The district court's award of rebates to the plaintiffs for the 1986-87 school year is affirmed. The SBTA's procedure for collection of agency shop fees fails to protect the nonmembers' constitutional rights as identified in *Hudson*. Therefore, we reverse the district court's decision finding **[1230]**the plan constitutional and remand for the entry of an appropriate injunction against the collection of agency shop fees until such time as the SBTA changes its procedure regarding advance reductions and advance notice. Further, the plaintiffs are entitled to attorney's fees in an amount to be determined by the district court.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

KOZINSKI, Circuit Judge, dissenting in part:*

This case is about $8 a month in union agency fees. And it's not even about *who* gets the $8—everybody agrees that plaintiffs are entitled to the money—but about the precise timing and procedure for the rebate. It is over such a trifle—such a *bagatelle*, as the French would call it—that this lawsuit is brought, with all the attendant costs and burdens of modern litigation. At bottom, this is a protest action by certain teachers against a union to which they do not belong but to which they are forced to contribute financially. Their frustration is understandable, but they have chosen the wrong forum for resolving what is essentially a political dispute.

I

I start with the proposition that, pursuant to state and federal labor laws, the union performs legitimate and important functions in its capacity as exclusive bargaining representative for teachers employed by the San Bernardino City Unified School District. That plaintiffs choose not to join the union makes no difference; they are deemed, by law, to receive substantial benefits from the union's representational activities, and they are required to contribute an agency fee to pay for these benefits. At issue here is only a small portion of the agency fee—about $8 per month—which the union spends on nonrepresentational activities. Everyone agrees that the union may not use plaintiffs' money for those purposes.

And it doesn't. All of the agency fees collected from nonmember employees are put into an independently controlled

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* I join part II of the majority opinion, which holds that the teachers' filing of the complaint provided sufficient notice of their objection to the collection of fees.

escrow. If a nonmember wishes to retain amounts earmarked for nonrepresentational purposes, he need only advise the union in writing by November 15. By early December, the union pays out the $24 already collected, together with an up-front rebate of the $56 that will be collected over the next seven months, provided the employee accepts the union's apportionment. An employee who challenges the apportionment can force the union to arbitrate the matter. The arbitration takes place in January and the objecting employee's account is settled before April 30. By that time the objector will have contributed $56 into escrow, which he gets back with interest, along with $24 up front to cover the remaining three months of the school year. In either case, the objector makes a small profit.[1]

Precedent joins common sense. The Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), listed three—and only three—requirements a union must meet in a situation such as this. First, none of the money collected from the objectors may be used—even temporarily—for nonrepresentational purposes. *Id.* at 305, 106 S.Ct. at 1075. Citing *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 n. 31, 97 S.Ct. 1782, 1799 n. 31, 52 **[1231]**L.Ed.2d 261 (1977), the Court decried the "tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" 475 U.S. at 305, 106 S.Ct. at 1075. Here, the union uses not a penny for nonrepresentational activities, as 100% of the agency

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[1] Assuming an interest rate of 10%, a non-arbitrating employee would lose about 20¢ of interest on the $24 held in escrow for the first three months. Because of the advance rebate, however, he would get the $56 before he would have earned it as salary. At the same interest rate, the rebate would be worth about $1.80 in advance interest, for a cool $1.60 of profit.

The employee who goes to arbitration still makes a profit, albeit a less munificent one. Assuming the arbitrator upholds the union's calculations, the employee would receive $56 with interest, which would compensate him for the lost use of the money. He would, however, get an up-front rebate of $24, which would be worth about 20¢ in advance interest. Not exactly a killing, but better than nothing.

fee is safely tucked away in escrow. Thus, objecting employees do not suffer the injustice of having their money used to advance causes they abhor.[2]

The only other first amendment harm plaintiffs suggest is that the $8 a month is not available to *them* for three (or seven) months, so they are unable to use the money to exercise *their* first amendment rights. Appellant's brief at 25-26. If this argument were accepted, every suit for money against a party acting under color of government authority would automatically become a first amendment case. In any event, it is a type of harm that the Court in *Hudson* did not recognize.[3]

Second, *Hudson* requires that the union provide objecting employees with "sufficient information to gauge the propriety of the union's fee." *Id.* 475 U.S. at 306, 106 S.Ct. at 1075. The union does this, as the district court found and the plaintiffs seem to concede. Maj. op. at 1225 n. 2.

Hudson's third requirement is that an impartial arbitrator be available to make a prompt decision as to what portion of the

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[2] In fact, the union goes well beyond what the Supreme Court requires; under *Hudson*, the union need not give up control over the entire agency fee, only the portion that might reasonably be questioned by an objecting employee. 475 U.S. at 310, 106 S.Ct. at 1077. By putting the entire agency fee into escrow, the union eliminates any quibble about what amount might be deemed reasonably subject to question.

[3] Surprisingly, this theory is not without support in the case law. The Sixth Circuit embraced such a claim in *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir.1987), and even one pre-*Hudson* Ninth Circuit case seems to have casually mentioned the unavailability of funds as a factor in establishing first amendment harm. *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir.1970). For the reasons explained in text, we should decline to follow the ill-advised ruling of the Sixth Circuit. And, in the two decades that it has been on the books, the *Seay* dictum has never been followed; any precedential effect it may have had has surely been dissipated by the Supreme Court's intervening ruling in *Hudson*.

fees are used for nonrepresentational purposes. *Id.* at 307, 106 S.Ct. at 1076. Plaintiffs make no claim about the timing or adequacy of the arbitration procedure.

Unlike the majority here and the Sixth Circuit in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987), I see nothing in *Hudson* that prevents the union from temporarily withholding that portion of the agency fees that is to be used for nonrepresentational purposes. The Court's concern in *Hudson* about *use* of the money for prohibited purposes is not relevant here; no legitimate first amendment interest is violated by the temporary *collection* of the money. Any due process concern is satisfied by the fact that there is an accounting, the opportunity to have the matter resolved by an impartial arbitrator, and the payment of interest (or its equivalent, an advance rebate) to make up for any lost use of the funds. I might be more concerned if the amounts in question were larger, if they threatened to deny plaintiffs and their families food and shelter. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). But we're talking about $8 a month for three or, at most, seven months, an amount unlikely to break the family budget.

Nor does *Hudson* call into question the union's method of notification, as *Hudson*'s discussion of notice goes entirely to completeness and accuracy. Nothing would be gained by giving nonmembers the information before any deductions are made. The relevant event is not the commencement of the deductions but the deadline for requesting a refund or review by an impartial arbitrator. Notice, after all, must have a purpose. The purpose here is to allow nonmembers to make a meaningful decision in exercising their right to object. So long as the union provides adequate information well in advance of the time when nonmembers must raise their objections, the purpose of notice is amply served.

[1232] II

Plaintiffs find themselves in an uncomfortable situation: They are represented by a union they do not support and to

which they are, nevertheless, forced to contribute. They obviously resent this and bristle at being deprived, even temporarily, of a portion of their income. These are legitimate concerns, but the union has legitimate interests as well. Under applicable law, the union is the bargaining unit's lawful representative, and it is entitled—indeed required—to collect from everyone in the unit a pro rata share of the funds it expends on representational activities, and to do so in an orderly and cost-efficient manner.

Ideally, of course, the union would collect from nonmembers only that portion of the agency fee dedicated to representational purposes. But that is not so easy to accomplish in practice. Here, the union has advanced a legitimate, neutral reason for the procedure it has adopted: It is impossible or, at any rate, very difficult, to identify the objectors during summer vacation, when the names and addresses of all the teachers are not yet known.[4] In light of this constraint, the union has come

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[4] The burdens and difficulties imposed on the union by alternate procedures are detailed in the stipulation of the parties below:

> In developing its agency fee rebate procedure, CTA considered sending fee payers the Hudson notice before any deductions took place, rather than immediately following the first deduction as is provided in CTA's rebate procedure. However to send the notices before deduction was considered basically unworkable, given the school year nature of employment of the teachers that CTA locals represent. In schools, virtually all teachers are employed for the entire school year and virtually all new employees begin work at the same time—the start of the school year around September 1. If notices were sent prior to the start of the school year several problems would result. Many notices would go to the wrong address since approximately 8% of teachers change addresses each summer and the notices are sent, if possible, to their home addresses. Changed addresses for teachers are typically not available from the districts until the end of the first month of school. In addition, teachers for whom CTA has only a school addresses would not receive a notice. Many unnecessary notices would be sent at great expense to teachers who had retired or changed school districts. Finally, new teachers are typically given 30 days to decide whether to join the union or become a fee payer.

up with a procedure that accommodates the legitimate interests of the minority, while preserving the union's right to collect agency fees without undue administrative costs. Tyranny of the majority this simply is not.

I do see, however, a different kind of tyranny in this case—the tyranny of the modern lawsuit. In a dispute over interests that are, in my judgment, adequately served and in any event minuscule, the plaintiffs have managed to impose on the [1233]defendants very substantial litigation costs. Win, lose or draw, the union will have spent a substantial chunk of the funds

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Consequently, these teachers could not receive a notice prior to the first deduction (September 30) unless the date of the first deduction were postponed. If postponed, new teachers would have a different pro-rated agency fee deducted than continuing teacher/fee payers, a result with other problems (see below).

In developing the procedure CTA also considered having objecting fee payers pay a reduced fee consistent with CTA's estimate of chargeable expenditures. This procedure was not adopted for several reasons. CTA had used a reduced fee system in the past but experienced problems because several school districts had refused to deduct a different amount for agency fees than for member dues. Moreover, use of a reduced fee would require that Hudson notices be sent at least 30 days *prior* to the first deduction so the identities of the objecting fee payers could be determined. This was considered unworkable as discussed above. The only other option is to send the notices on October 15 when identities of the year's fee payers and their addresses are known, and to delay collection of the fee until the end of December when the identities of objectors who would be entitled to a reduced fee are known. This would deprive CTA, NEA and affiliated locals of any agency fees for four months each year. In addition, if collection is delayed for four months, fee payers would then have to pay a much larger amount each month in fees for the rest of the school year than members pay in dues in order to recoup amounts owed for the four months when deductions did not take place. All fee deductions in school districts are normally divided over a ten month period. CTA was concerned that this unequal deduction might raise equal protection claims. Accordingly, after careful consideration, the current system was adopted.

Stipulation at 16-18 (filed Sept. 19, 1988) (emphasis in original).

collected and earmarked for representation. Moreover, the majority's ruling will impose on the union a burden vastly out of proportion to any benefits plaintiffs may gain by getting their $8 a month starting in September rather than December.[5]

We do the judicial system, and the society it serves, serious harm when we countenance such *bagatelle* litigation. Life in modern society is complicated and not every dissatisfaction should find a remedy in court. *See Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir.1989) (Kozinski, J., concurring). If plaintiffs are unhappy with the union, they have every right to vote against it, persuade others to do the same, or lobby the legislature for repeal of laws that force them to contribute to a union to which they do not belong and which they obviously resent. But using litigation to pursue such political objectives by making life difficult for the union is not appropriate. We have a responsibility to avoid encouraging such lawsuits, which are not only costly to the parties involved but divert scarce judicial resources from more pressing and significant issues. Four circuits have held that lawsuits such as this one have no merit; we make a serious error—prudentially as well as legally—by refusing to follow suit.

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[5] The majority suggests that focusing on the small amounts in issue would "improperly place a pricetag on constitutional rights." Maj. op. at 1228 n. 7. Not so. My point is that there is no constitutional right at stake here at all, so the *only* thing in issue is the precise timing when plaintiffs are to receive a little bit of money.

ORDER OF THE UNITED STATES

DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

October 4, 1988

[Clerk's Stamp Omitted in Printing]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEBRA J. GRUNWALD, et al.,	CASE #CV 87-3381 WDK (JRX)
Plaintiffs,	ORDER RE FINAL JUDGMENT AND ISSUANCE OF PERMANENT INJUNCTION
v.	
SAN BERNA[R]DINO CITY UNIFIED SCHOOL DISTRICT, et al.,	
Defendants.	

This matter came before the Court on the Plaintiffs' Motion For a Permanent Injunction. Having considered the materials submitted and the arguments of counsel at the September 19, 1988, hearing, the Court hereby Orders that the Motion is Granted in Part. This Order is based on the following considerations:

1. Any permanent injunction issued by this Court against the San Berna[r]dino Unified School District must be a narrowly tailored remedy. The Ninth Circuit has held, "Injunctive relief against a state agency or official must be no broader than necessary to remedy a constitutional violation. *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986), *cert denied* 107 S.Ct. 2462 (1987). This Court's function in reviewing the agency fee procedure is limited to "determining whether a constitutional violation has occurred and to fashioning a remedy which does no more and no less than correct the constitutional violation". *Id.* at 1087.

2. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Supreme Court established the constitutional requirements under the First and Fourteenth Amendments for the collection of agency fees. In *Hudson*, the Supreme Court set forth three procedural requirements for this collection of fees:

> [1] an adequate explanation of the basis for the fee must be provided;
>
> [2] agency fee payers must be given a reasonably prompt opportunity to challenge the amount before an impartial decision-maker; and
>
> [3] the procedure must preclude the use of nonmembers' funds to finance ideological activities unrelated to collective bargaining and contract administration.

Hudson, 475 U.S. at 305-307.

The Supreme Court in *Hudson* also emphasized that in any agency fee plan, the union must bear the burden of proving what proportion of its expenditures was for collective bargaining and contract administration. *Hudson*, 475 U.S. at 306. In the Agency Fee Collection And Rebate Procedure (hereinafter "Procedural Guidelines") established by the California Teachers Association (hereinafter "CTA") and adopted by the San Berna[r]dino Unified School District, this burden is not explicitly recognized as the standard for the review procedure. The only language in the Procedural Guidelines which remotely resembles a recitation of the union's burden merely states, "The impartial decision-maker shall apply recognized legal concepts in determining the appropriate rebate." *See* Procedural Guidelines, Sec III(D). This general language does not meet the *Hudson* requirement.

However, the Court does find that the stipulated facts establish that the arbitrator did, in fact, apply the proper standard when reviewing the union expenditures in the hearings held in the last two years.

3. This Court holds that an agency fee plan with post-deduction notice of *Hudson* rights, and an escrow of all nonmember funds until the proportion of chargeable expenditures is determined by the union, is constitutional. The plain language of *Hudson* clearly indicates that a 100% escrow more than satisfies the constitutional requirement that nonmember fees not be used for ideological purposes by a union. *Hudson*, 475 U.S. at 310. Furthermore, the Court in *Hudson* did not set forth any requirement that notice to nonmembers of the right to object to the agency fee plan be made before any fees are deducted from their wages.

4. The CTA and the San Berna[r]dino Unified School District did not provide the plaintiffs rebates for the two month period during the 1986-1987 fiscal year when the agency fee plan was in force. Defendants have asserted that the plaintiffs are precluded from collecting the rebate for that period because they did not comply with the requirements of Sections III(a) and III(c) of the Procedural Guidelines. These sections require that all persons who wish to obtain a rebate must advise the CTA of their objections in writing. Furthermore, this notice of objection must be filed within 30 days and include the name, address, local union chapter, and social security number of the objector.

Plaintiffs filed this action on May 27, 1987. The CTA was added as a party on May 28, 1987. Plaintiffs' complaint alleged that the agency rebate system was unconstitutional. Surely, an objection by these teachers to any of their money being collected is sufficient objection to the proportional rebate system established by the union. The complaint was written, included the names of all the plaintiffs and was obviously received by the CTA, as the CTA appeared in this Court and responded in writing to the successful application of these teachers for a temporary restraining order. In addition, defendants only sent out their *Hudson* notices from May 28, 1987 through June 2, 1987. Not only was the complaint filed before the 30 day period provided by the union in its Procedural Guidelines, the complaint was filed before notice of the right to object was sent by the union. Also, since the teachers were suing the San Berna[r]-

dino Unified School District, it was readily apparent to the CTA which local chapter of the union was involved in the dispute. Thus, the Court finds that the plaintiffs substantially complied with the CTA's notice requirement for objections.

5. Defendants' Procedural Guidelines reserve the right of the union to no longer have a hearing in front of an arbitrator and adopt whatever procedure is created by the Public Employment Relations Board (hereinafter "PERB"). This Court notes that *Hudson*'s only reference to the type of hearing required was that it need not be a "full-scale administrative hearing". *Hudson*, 475 U.S. at 308 n.21. The amorphous issue of the constitutionality of the unknown form of a potential PERB procedure is not ripe for adjudication at this time. *See e.g. Abbott Laboratories v. Gardner* 387 U.S. 136 (1966). Nevertheless, the Court cautions the CTA against changing the form of the hearing in such a way that it impinges on the procedural due process rights of the teachers.

Based upon the above considerations, Defendants San Berna[r]dino Unified School District and the California Teachers Association are ordered to do each of the following:

(A) Revise Section III(D) of the Procedural Guidelines to include language which explicitly states that the CTA bears the burden of proving it has determined the correct amount for its expenditures on collective bargaining and contract administration.

(B) Provide all of the teachers who were plaintiffs in this action with a rebate for the two month period during which the agency fee procedure was in effect in the 1986-1987 fiscal year.

This Order supersedes any preliminary or tenative ruling made by this Court at the hearing on September 19, 1988.

IT IS SO ORDERED

DATED: OCTOBER 4, 1988.

/s/
William D. Keller
United States District Judge

RELEVANT PARTS OF THE

CALIFORNIA STATUTES

RELEVANT PARTS OF THE CALIFORNIA STATUTES

California Education Employee Relations Act, Cal. Ann. Gov. Code

§ 3540.1. Definitions

(i) "Organizational security" means * * * (2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization [i.e., exclusive representative], or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization * * * .

§ 3546. Necessity of arrangement to be agreed upon by both parties; rescission

[O]rganizational security, as defined, shall be within the scope of representation.

Cal. Ann. Educ. Code

§ 45061 Deductions for organization service fees

The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall * * * reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under [the Education Employee Relations Act] * * * .